REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HIGH COURT CRIMINAL APPEAL NO. 43 OF 2017

ORIGINAL CR. CASE NO. 505 OF 2010 AT PM'S COURT AT MAKUENI

KIMANTHI MWEU …… APPELLANT

-VERSUS-

REPUBLIC ……...…… RESPONDENT

JUDGEMENT

1. The Appellant Kimanthi Mweu was charged with offence of defilement contrary to **Section 8(2) of Sexual Offence Act No. 3 of 2006.**

2. The particulars were that between 24th September and 27th September 2010 at [Particulars withheld] village, Wote Location in Makueni District within Eastern Province unlawfully and intentionally committed an act which caused penetration with his genital organ to that of WM, a girl under the age of 11 years.

3. Alternative charge indecent assault of a female contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006 particulars were that between 24 and 27th September 2010 indecently assaulted WM a girl under the age of 11 years by touching her private parts.

4. When matter came for plea on 12/10/2010, the Appellant pleaded guilty and he was convicted and sentenced to life imprisonment. Being dissatisfied with above decision, the Appellant appealed against conviction and sentence and set out the following grounds amended supplementary grounds of appeal:-

> *- **That** he did not understand the ingredients of charge which was read in Kiswahili,*
>
> *- **That** trial magistrate erred by recording a plea of guilty in both main count and the alternative charge and finally at the time of the commission of the alleged offence he was in confinement vide Cr C No.473 of 2010 a fact concealed by the prosecution.*

5. The parties agreed to converse the appeal via written submissions where they filed and exchanged.

6. The Appellant submits that although he replied to the charge in Kiswahili it does not necessarily mean that he understands whatever was read to him. He says the charge was read in English. He further says that the facts were read in English but interpreted in Kiswahili.

7. He argues that if he understood what was read, he could not have pleaded guilty. He relies on **ADAN – VS- R (1973) EA 45.**

8. He submits that in the above case it was stated that court recording the plea of guilty – must show in its record that the person pleading guilty understands the consequences of his plea.

9. He also relied on the of **NJUKI –VS- R (1990) EKLR 334** where the court held that; ***"it has been said time and time again that pleas recorded in the words such as " I admit" "I accept" "I plead guilty" "it is time" "I am guilty and so on cannot be considered as unequivocal pleas***.

10. The Appellant submit that the plea must be free and voluntary. He relies on **OLEL –VS- R (1989) EKCR 444** where the court stated that if a plea of guilty is not voluntary it cannot be said to be unequivocal it would in this circumstances be a nullity.

11. On ground two, he submits that it is shown on record he pleaded guilty to both charges. He was not asked as to while he preferred pleading to. Thus he submits, there was misdirection and miscarriage of justice upon himself.

12. Further on ground 3 he submits that prior to the diverse dates of 24th to 27th September 2010, he had been arrested for offence of being in *possession of narcotic drugs namely bhang* and jailed for 7 months vide criminal case No. 473/2010. He had to be produced for plea in court in the instant defilement case.

13. Thus he submits that he could not have committed defilement as alleged as he was in custody. He therefore seeks his appealed to be allowed. On it pats, the prosecution submits that the plea was unequivocal.

14. The charge was read and the Appellant answered "IT IS TRUE" and a plea of guilty was recorded.

15. The facts were outlined and Appellant answered that the facts were correct and he was convicted. On mitigation the Appellant stated that he sought forgiveness as he committed same act when he was drunk. The plea was thus unequivocal under Section 207 Criminal Procedure Code.

16. On sentence, the prosecution submits that the imposed sentence is prescribed by the law vide Section 8(2) Sexual Offence Act and in fact it is the minimum provided sentence by the law.

17. The court has gone through the record and the submissions of the parties. I find the issues are:-

- Whether the plea was Equivocal?

- Whether there was error of law and facts in recording a plea of guilty in respect of main count and the alternative charge.

- Whether the Appellant was in custody at the time of the alleged act?

18. On 12/10/2010, the Appellant was produced in court and after charge was read to him, he answered that same "*is true*".

19. A plea of guilty was entered. Alternative charge was also read and he answered also that same is true. The court noted that Appellant could not plead to both charges and thus adjourned court to convene in camera for facts to be read.

20. The facts were outlined by the prosecution and the Appellant answered to the same and he answered that the same facts as read to him were true.

21. He was convicted on his own plea of guilty in respect of the main charge of defilement contrary to Section 8(2) Sexual Offence Act.

22. In mitigation he stated that *"I ask for forgiveness I did the act when I was drunk."* He was thus sentenced to life imprisonment.

23. The court finds that the Appellant clearly understood the charge and what he was answering to. The plea was voluntary and unequivocal.

24. On plea of guilty being recorded on the two charges that is the main and the alternative, the same was corrected by the court by stating that Appellant could not plead guilty to both charges. The court went ahead to have facts on the main charge outlined by the prosecution.

25. The ground therefore fails. In respect of the allegation that at the time of the commission of the offence that he Appellant was in custody. The court has looked at the records of Cr C 473/10 Makueni where he was charged with possession of Bhang. He was arrested and took plea on 28/09/2010 and sentenced to 7 months imprisonment on 07/10/2010.

26. The defilement offence is alleged to have been committed between 24th and 27th September 2010 when the Appellant was a free man by then he had not been arrested as alleged. The same ground also fails.

27. The Appellant has also raised the issue that being 9 sermons offence he was facing he ought to have been explained the consequences of pleading guilty. He relies on **ADAN –VS- R SUPRA** and **BOIT – VS- R (2012) IKLR 815** which are to the effects that where the offence is punishable by death the court recording the plea of guilty must show in its record that the person pleading understands the consequences of his plea.

28. The court notes that the both authorities refer to the situation where the offence is punishable by death.

29. The instant matter is on defilement where the offence is punishable by life imprisonment but not death. In any event it is apparent the Appellant understood the charge as demonstrated by his mitigation when he sought forgiveness as he claimed to have committed the act while he was drunk.

30. The same cases are thus distinguishable on facts. The court therefore reaches a conclusion that the appeal lacks merit and is thus dismissed.

SIGNED, DATED, AND DELIVERED AT MAKUENI THIS 8TH DAY OF MAY, 2017.

C. KARIUKI

JUDGE

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